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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 1030 19

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROYAL W. IRWIN,
Attorney for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Alfred S. Penn respectfully shows:

(1) Violation of the Federal Safety Appliance Act.

The petitioner (plaintiff in the trial court) brought an action against the respondent (defendant in the trial court) for damages resulting from personal injuries in the United States District Court for the Northern District of Illinois, Eastern Division.

It was alleged in the complaint that the respondent unlawfully equipped and maintained a defective coupler on a

freight car, in that the same could not be uncoupled by means of a pin lifter, contrary to the provisions of the Federal Safety Appliance Act. (R. 3.)

The petitioner was a switchman employed by the respondent in switching cars in the Proviso Yard. (R. 10.) The respondent was engaged in classifying cars, and in doing so it was the duty of the petitioner to uncouple cars from the train in order that they might be shunted onto the various tracks in the yard. (R. 12.) At the time of the accident the respondent intended to shunt a certain car onto a switch track, and to do so the petitioner stood upon the stirrup of the car to be cut off in order that he might uncouple that car when it attained sufficient momentum to carry it to its destination.

It was necessary for the petitioner to hold onto a grab iron with one hand, and, while standing on the sill step, reach over with the other hand and pull on the pin lifter.

The complaint made by the petitioner was that the pin lifter did not uncouple the cars, when he attempted to lift it, as it should have done, and, after making several attempts to uncouple the car by means of the pin lifter, the petitioner got upon the ground and ran along beside the car, where he believed he could better accomplish the act. After making three or four attempts to uncouple the car by means of the pin lifter while running along beside the car, he finally got it to work, but at that moment he stepped into a hole in the roadbed and broke his leg. (R. 16.)

What actually occurred is best expressed by the testimony of the petitioner himself. The following appears on pages 15 and 16 of the transcript:

> "Q. And when you got hold of this pin lifter on the outside end, what did you do to it?
>
> A. Whenever I got the slack, I made an effort to lift it.

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Q. When you pulled on the pin lifter, what did it do?
A. It did not function.
Q. It did not function. What did you do then?
A. I made another effort, a harder effort to get it.
Q. How did you do it?
A. I jerked harder.
Q. What happened to the pin lifter then?
A. Just like it was.
Q. What did you do after that?
A. I made about five or six efforts to get it, on the car.
Q. You mean, while you were standing on the car?
A. While I was standing on the car.
Q. Did the pin lifter work while you were standing on the car?
A. It did not.
Q. You said you waited for the slack. What do you mean by that?
A. Just as soon as they kick these cars, when all of the weight comes together, you can operate that pin. Otherwise you can't.
Q. How far do the cars have to move before you can operate the pin?
A. Just as soon as the slack comes in.
Q. What is that?
A. Just as soon as they come together.
Q. Had they come together before you operated the pin or afterwards?
A. They was together when I operated the pin.
Q. When you tried to operate it?
A. When I tried to operate it.
Q. And did the pin lifter operate at that time?
A. Not until after I got off the car.
Q. Should it have operated at that time?
A. It should.
Q. Why did you get off the car?
A. Well, I was wearing myself down making a stronger effort to try to get it. I thought if I could get off, it would be easier, and I could get it.
Q. What did you do?
A. I stepped off, and made three efforts.

Q. And what happened to the pin?
A. It come.
Q. What happened to you?
A. I went in a hole.
Q. What hole?
A. Between the ties.
Q. At the time that the pin lifter came, at the time it operated, was that the first time that it operated?
A. It was.
Q. What did you do to make it operate?
A. Three times I gave it all I had, after I got on the ground.
Q. You mean while you were running along?
A. Yes, sir.
By Mr. Irwin: Q. What did your foot go into?
A. Between the rod, the tie rod and the tie."

The issue upon the trial was whether the respondent furnished a coupler which was defective, contrary to the provisions of the Federal Safety Appliance Acts.

The jury returned a verdict finding the respondent guilty and assessing petitioner's damages at the sum of $15,000.

An appeal was taken by respondent to the Circuit Court of Appeals for the Seventh Circuit, and that Court reversed the judgment and remanded the cause with directions to grant the defendant's motion for a judgment in its favor notwithstanding the verdict.

This petition is filed to induce the Supreme Court of the United States to reverse the judgment of the Circuit Court of Appeals.

(2) Basis of Jurisdiction.

The jurisdiction of this court is invoked under the provisions of the Federal Employers' Liability Act. (45 U. S. C. A. 287, Sec. 56.)

The decision was rendered by the Circuit Court of Ap-

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peals on November 6, 1947. The petition for rehearing was denied December 3, 1947.

This case is reported in 163 Fed. (2d) 995.

(3) Questions Presented.

The Circuit Court of Appeals erroneously found that "plaintiff mounted the car next to the one to be uncoupled" and "after having attempted to unsuccessfully operate the coupler from this awkward position he stepped upon the ground"; also that "certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect."

The petitioner testified:

> "Q. Which car did you get on?
> A. I got on the north—I got on the first car, the car that was supposed to be cut off." (R. 3.)

Thus it appears that the Circuit Court of Appeals has erroneously decided the case upon a false factual situation. This error was called to the attention of the Circuit Court of Appeals in a petition for rehearing filed in that court.

Although petitioner testified that when the pin lifter did not function he made a harder effort to get it and jerked harder on it about five or six times while standing on the car; not being able to operate it (R. 5), and, as he said, "wearing myself down making a stronger effort to try to get it," he made three efforts to operate the pin lifter when running along beside the car. He testified: "Three times I gave it all I had after I got on the ground." (R. 6.)

The Circuit Court of Appeals found that it was plain that he was not in a proper position to operate the coupler, and the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts.

In these circumstances the question is: May the Circuit Court of Appeals reweigh the evidence and hold for naught the finding of the jury?

(4) Reasons for Allowance of Writ.

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. It is obvious that a pin lifter which fails to operate efficiently renders the coupler defective, contrary to the provisions of the Federal Safety Appliance Act. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of the Supreme Court of the United States. It is submitted that these reasons call for the exercise of this Court's power of review.

WHEREFORE petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court for its review and determination, on a day certain named therein, a complete transcript of the record in the case numbered and entitled on its docket as No. 9253, Alfred S. Penn, Plaintiff-Appellee *vs.* Chicago and North Western Railway Company, Defendant-Appellant; that the judgment of the Circuit Court of Appeals be reversed by this Court; and that the petitioner may have such other and further relief as seems just.

Respectfully submitted,

ALFRED S. PENN,
Petitioner,
By ROYAL W. IRWIN,
Attorney for Petitioner.

Royal W. Irwin,
29 S. La Salle Street,
Chicago, Illinois.

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Verdict Was Sustained by the Evidence.

The Circuit Court of Appeals made an egregious error in finding from the evidence that the petitioner mounted the car next to the one to be uncoupled and that he unsuccessfully attempted to operate the coupler "from this awkward position."

The opinion of the Circuit Court of Appeals is based upon a false premise. The petitioner testified: "I got on the first car, the car that was supposed to be cut off." (R. 13.)

No witness testified that "plaintiff mounted the car next to the one to be uncoupled," as stated in the opinion.

Upon this false premise the Court held: "It is plain, so we think, that he was not in a proper position to operate the coupler."

The opinion of the Circuit Court of Appeals seems to hold that in their belief the petitioner failed to use a reasonable effort to bring about the opening of the coupler—that, in the face of the testimony of the petitioner that in his effort to open the coupler he jerked harder (R. 15), that he was wearing himself down making a stronger effort to try to get it, and that three times after he got on the ground he gave it all he had. (R. 16.)

These were all jury questions. The jury must have found that the petitioner was in the proper position on the car to be cut off. There was no evidence upon which they could have found that he was in an improper position. The jury must have found that from his various efforts to operate the pin lifter it had failed to work efficiently. The Circuit Court of Appeals is without jurisdiction to arbitrarily discard evidence supporting the petitioner's claim.

In the case of *Lavender* v. *Kurn*, 327 U. S. 645, 653, the Court said:

> "Only when there is a complete absence of probative facts to support the conclusions reached does a reversible error appear."

And in *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, the Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The decisions of the Supreme Court of the United States

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in recent years have made it clear that the jury is the arbiter of the facts in cases arising under the Federal Employers' Liability Act. The refusal of some courts to follow the clear mandate of the Supreme Court of the United States baffles explanation.

The opinion of the Circuit Court of Appeals states:

> "We think the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts."

Thus the Court assumes the position of jury. The pin lifter should have operated when petitioner rode upon the side of the car in the proper position. The Circuit Court of Appeals overlooks the fact that by reason of the failure of the pin lifter to operate when petitioner was in his proper position on the side of the car he was compelled to do a much more dangerous thing, namely, to run along the roadbed beside the car while it was moving. The ties, ballast and roadbed are uneven and frequently there are holes and places where tie rods pass through. The danger to petitioner was enhanced by having to run along beside the car where there was danger of doing just what petitioner did, namely, stumbling in a hole and breaking his ankle. We cannot say that the Circuit Court of Appeals would make a good jury.

There has been an attempt on the part of the Circuit Court of Appeals for the Seventh Circuit as well as other Circuit Courts of Appeal and State Courts to deny that the lack of efficiency in the operation of a pin lifter is evidence of a defective condition. (*Chicago, M., St. P. & Pac. R. Co.* v. *Linehan*, 66 Fed. (2d) 373; *Meisenhelder* v. *Byram*, 233 N. W. 849; *Western & Atl. R. R. Co.* v. *Gentle*, 198 S. E. 257; *C. & O. Ry. Co.* v. *Charlton*, 247 Fed. 34.)

The defect in the coupler in this case may have consisted

of its defective condition or its defective functional operation. There was evidence that in fact the pin lifter did not work efficiently. This is evidence sufficient to sustain the charge of a violation of the Federal Safety Appliance Acts.

In the case of *Myers* v. *Reading Co.*, 331 U. S. 477, the Court said:

> "'Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Philadelphia & R. R. Co.* v. *Auchenbach*, 3 Cir., 16 F. 2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. • • •
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> • • • • •
>
> "'• • • the testimony of plaintiff that the brake was used in the normal and usual manner and failed to work efficiently but did so inefficiently, throwing him to the ground, is such substantial evidence of inefficiency as to make an issue for the jury.'"

It Was Error to Enter Judgment Against the Plaintiff.

The complaint charged that the pin lifter was defective. The only evidence upon the trial as to the condition of the pin lifter was that of the petitioner, who testified that it failed to work efficiently. The Circuit Court of Appeals in its judgment found: "There is no substantial evidence to sustain the verdict."

If there was no substantial evidence to sustain the verdict, then a new trial should have been granted in order to allow the plaintiff to produce other sufficient evidence of the defectiveness of the pin lifter. None of respondent's

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car inspectors were called to testify as to the condition of the appliance after the accident.

In the case of *Stewart* v. *Southern Railway*, 315 U. S. 283, an identical situation existed. It was claimed that the deceased was killed by reason of a defective pin lifter. A judgment for the plaintiff was reversed by the Circuit Court of Appeals, the Court holding that there was no substantial evidence to sustain the verdict, and the cause was remanded with directions to enter judgment for the respondent. Upon certiorari to the Supreme Court of the United States, this Court held (page 286):

> "If the issue as to the condition of the coupler was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

PRAYER.

It is urged that this Petition for Certiorari be granted to permit a full consideration of the matters involved, to the end that the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.